Supreme Court, U.S.
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In The

Supreme Court of the United States

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Alfy Levine Mayes – Petitioner

Vs.

Galveston Juvenile Detention Center ETAL – Respondent

ON PETITION FOR A WRIT OF CERTIORARI

To The UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

# PETITION FOR A WRIT OF CERTIORARI

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53 pp

# QUESTIONS PRESENTED

The United States Supreme Court simplified the instruction for the granting of Summary Judgment concerning Title VII cases in the case of Reeves vs Sanderson Plumbing Inc.

Although, Pro se Mayes was informed that his case was not so "factually or" "legally" complex, it took him four and a half years to get his case heard. "Mayes' case was not so and factually legally complex," but as Mayes built his case, those in authority disregarded the Supreme Court's instructions in regards to his (Mayes) case.

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Galveston County Juvenile Detention Center

and

Galveston County..

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# PETITION FOR A WRIT OF CERTIORARI

Alfy Levine Mayes
#36-16th Avenue North
Texas City, Texas 77590
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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIOTATI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[X] Federal Court:

The opinion of the United States court of appeal appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears a Appendix B to the petition and is unpublished.

## JURISDICTION

[X] Federal Courts:

The date on which the United States Court of Appeals decided my case was March 1, 2002.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 3, 2002, and a copy of the order denying rehearing appears at Appendix D

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment and Fourteenth Amendments to the Constitution

Title VII Civil Rights Act

USC Title 42 § 1981 and 1983

Texas Tort Claims Act

Color of Law

## STATEMENT OF THE CASE

Petitioner Alfy L. Mayes (hereinafter, "Mayes") was fired from his position as a Juvenile Detention Officer for allegedly violating a policy on Aug 22,1995. Preferentially treated, Mayes' co-worker Lee King, whom violated this same policy on August 4,1995, at the time of Mayes' termination had not been reprimanded and was only reprimanded after Mayes made it known that King violated this policy. King was also noted to have violated other policies in conjunction with Mayes' policy violation and swift termination, but was never reprimanded for the other recorded violations. [1] Mayes also noted that his termination was a result of willful and malicious intent on the part of his supervisors. And being accused of an escape presented that it was because of the negligence of the defendant in making known needed repairs to the facility that the juveniles escaped [2].

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[1] See vol.2 pg 513,vol.3 pg 248 and noted by the District Courts Order # 66 pg359. Also, in Mayes' Motion For Court to Amend Final Judgment (vol.2 pgs 516-369 plus exhibits) Exhibit "D" noting King's behavior, conduct, and thoughts expressed by supervisors, fellow workers and some detainees.

[2] See Mayes complaint vol.1 pg. 116-113

After Mayes received his Right to Sue Notice from the EEOC, he was unable to retain counsel. Mayes filed suit himself on May 29, 1996 in the U.S. District Court, Galveston Division. Still with no counsel, Mayes was faced with either dropping his petition completely or pursuing his case in court, despite his unfamiliarity of litigation. Filing documents from the EEOC and the District Court informed Mayes that he could request for the appointment of counsel from the court. On January 21st 1997 Mayes requested for a court appointed attorney. His request was denied, but Magistrate Judge John Froeschner (hereinafter "Magistrate Judge") informed Mayes in an Order (#19) that his case was not so factually and/or legally complex that Mayes would be unable, with some guidance from the Court, to adequately represent his interests.[3] On March 18,1997 Galveston County moved for Summary Judgment. GC's Summary Judgement was **Denied** based on the recommendations of the Magistrate Judge on June 20, 1997. By November 14th 1997 both Mayes and GC consented to have their case heard before the Magistrate Judge. Again, GC moved for Summary Judgment filed on December 31st 1997.

Two years later on November 2nd 1999 the Magistrate Judge, Ordered Mayes by November 19th to send authenticated copies of interrogatories that Mayes submitted on February 5th 1998 in support of his summary judgment objection.[4] In these interrogatories GC had submitted different dates on when the policies in question were communicated to the workforce. The court also stated, (restated)

> "Plaintiff may also, wish to bolster the affidavit of Mr. Murphy by submitting a new affidavit from this individual containing information regarding his employment status during the relevant time frame, which would assist the Court in evaluating the basis of his personal knowledge regarding the posting of the building policies."

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[3] See Appendix E - EEOC form 161" and from the District Court "Guidelines for Litigants without Lawyers Southern District of Texas" #14 a copy of Mayes' Request, and decision on Mayes' request.

[4] See Crts Order#63 and Requested Interrogatories. vol.3 pgs.313-295.

[26]See Murphy's plus additional ee's Affidavits. vol.3 pgs 351-314

By November 9, 1999 Mayes submitted the court's requested material the updated affidavit of Larry Murphy Jr., and additional employee's affidavits (Eugene Washington, Robert King, Larry Thomas, and June V. Joseph) that also contested GC claim of said policies.[5] The Magistrate Judge despite stating his own findings of perjured statements, curiosities and suspicious actions of GC, on February 1, 2000 granted GC Summary Judgment and entry of dismissal was made on February 2nd 2000.[6] February 16th 2000 Mayes motioned for the District Court to amend its Final Judgment and to present additional evidence.[7]

Although Mayes had presented ample evidence to stop GC motion for judgement, the United States Supreme Court clarified the basis for such a motion in the case of **Reeves Vs Sanderson's Plumbing Inc**., 530 U.S. 133 (2000). On July 11, 2000 Mayes filed a Supplemental Brief to bring to the Magistrate Judge's attention the Supreme Courts ruling.[8] The Magistrate Judge noted that it had granted GC motion on fairly narrow grounds and Mayes' case was reopened, but only the discrimination complaint was allowed.[9] A scheduling conference was held on January 5, 2001 and trial was set for April 16, 2001. Mayes inquired about his Title 42 charges, but the Magistrate Judge never clarified the issues.[10] Trial commenced on April 16, 2001. As Mayes moved to present the exact violation of his co-worker Lee King the Magistrate Judge denied him. The jury verdict was against Mayes.

Mayes appealed, on May 21, 2001. He requested that the transcript fee is waived due to his family and financial status, the District Court, on June 26, 2001 denied his request.

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[6] See Appendix E Order #66 Granting of Sum Jud. Def purjury-pg 6 of diff in probationary status of King and Mayes. Curious- pg 8 of time frame of King's reprimand. Suspicious-pg 10 of disciplinary results.

[7] See Mayes' Mo for District Court to amend Final Jud/additional evidence vol.3 pgs 516-369.

[8] vol.3 pgs 536-517

[9] See Mayes' case reopened Order #70 vol.3 pgs 538-537

[10] See Mayes' Request of Status of Title 42 Claims/Jud Advisory/Request for Clarification vol.3 pgs 552-546.

In the Appellate Court (hereinafter AC) Mayes made the same request to the AC and was waiting on a response as to his request. Mayes thought that he would soon receive an answer from the court before a ruling would be made concerning his appeal, thus allowing him the opportunity to secure his transcripts by loan or some other means.

After Mayes filed his Brief the AC filed their ruling reaffirming the proceedings of the trial court and denying Mayes' request for his transcripts on March 1, 2002.

In its review the AC declined to address Mayes' discrimination claims without the trial transcripts, but briefed on a substantial First Amendment complaint about the FLSA and public concern, stating that Mayes' complaint being improper because it did not,

> "concern for example, the conditions of confinement at the center or the danger of escape or any other matter in which the public at large might have some interest."

And further, pointed out that concerning the FLSA,

> "We note that the FLSA provides a cause of action when an employer retaliates against an employee for filing a FLSA grievance."

Mayes noted that his complaint and arguments embodied the retaliation and public concern statutes given for an example by the Appellate Court.
Mayes' complaint of May 29, 1996 and amended complaint of October 23,1997. Under Facts and Causes of Action, letter D stated,

> "The defendant negligently failed to furnish Plaintiff with a safe place to work that would detain and deter detainees from easily escaping."

> "L. The Plaintiff believes that the Defendant was resentful of the Plaintiff for inquiring about the legality of the Defendant' required monthly staff meetings that were not compensated for."

M. The Plaintiff stated a grievance with respect to CJPO Jerry Esmond involving his subordinate supervisors mishandling of a shift change admonition."

N. The Plaintiff's stated grievance to CJPO Jerry Esmond was near the date of incident of August 22, 1995 and in retaliation, the Plaintiff believes the subordinate supervisors acted in malice regarding Plaintiff's employment.

O. The Plaintiff's supervisors fabricated stories concerning the Plaintiff to induce CJPO Jerry Esmond to terminate him.(Defamation, Libel and Slander)

P. Defendant's actions in discriminating and wrongfully terminating Plaintiff were harsh, oppressive, and malicious. The wrong done by the Defendant was aggravated by the kind of willfulness, wantonness, and malice for which the law allows the imposition of exemplary damages. Further, the Defendant acted with an evil intent to harm Plaintiff and to deter others from asserting their rights. The Defendant's conduct was intentional, and with conscious indifference to the rights of Plaintiff. For these reasons, your Plaintiff is entitled to recover all reasonable damages, and exemplary and punitive damages in addition to the amounts of his actual damages.

Q. Plaintiff was terminated with no opportunity to remedy any alleged deficiencies in his job performance.

As stated, Mayes' immediate supervisors were resentful of his inquiring about their (GC) FLSA violations lashed out at him in retaliation. And they (supervisors) "Continued" to retaliate against Mayes concerning the escape incident and gave no ear to the fact that in his (Mayes') defense his complaint embodied the AC 1st Amend Rights and public concern explanation. In reference to publics concern, it bears mentioning that the Center housed serious felony juvenile offenders, for such felons as armed robbery and murder.

Rule 15 (c) Relation Back, Supplemental Pleadings (d)

Mayes noted that if at the outset of his case, he mistakenly not legally argued his 1st Amendment Rights, other Constitutional rights or state law claims in his complaint, that this does not bar him from correcting his pleadings if the pleadings were there all along. And that Galveston County had knowledge that they were actionable pleadings, liability may still be found. The standard applied here is compared to that of the Magistrate Judge's, Order #42, Denying GC's Response in Opposition for Mayes to amend his complaint to add GC as a proper defendant. (Restated)

> " Finally, GC has had notice of this law suit through the common representation between the current defendant and the proposed defendant."

Likewise, GC through Mayes' pleadings was aware of these actionable pleadings (First Amendment, FLSA retaliation).

Mayes tried to secure his transcripts while at the same time prepare his request for a rehearing. Mayes missed his deadline, but filed a Motion for Out of Time. In his motion Mayes mentioned that he was under the impression that he would receive an answer concerning his transcript request before his appeal would be ruled on

Along with his motion, Mayes petitioned for a Rehearing En Banc, stating that the Appellate courts ruling conflicted with a decision of the United States Supreme Court in Roger Reeves Vs Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) and that consideration by the full Court was therefore necessary to secure and maintain uniformity of the court's decision.

Mayes' petition was granted on April 10, 2002. Also, with the AC order granting Mayes' petition the court included that motions for En banc request were not favored. Mayes was lead to believe that a Panel Rehearing under the precepts of "Error asserted in the Misapplication of Correct Precedent " to the facts of his case would better suit his petition. Mayes amended his petition for a Panel Rehearing and also stated Per Federal Rules of Appellate Procedure Rule 10 4(c) states

"If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Mayes noted,

"That while the transcripts were not totally unavailable; for the sake of time and the fact that the trial court did not allow Mayes to present the King violation anyway, his motion outweighs the Appellant's recollection as pertained in said rule 10 4(c). The trial court erred in not allowing Mayes to present highly relevant evidence in his case (Kings violation)."

On June 3, 2002 Mayes' petition was denied. Mayes moved to file his Petition for Writ of Certiorari.

On August 28, 2002 Mayes hand delivered a statement to GC Legal Department in reference to the Rules of Appellate Procedure, Rule 10 4 (c).

ARGUMEMENT

I. During his trial, Mayes should have been allowed to present the "exact policy" violation of his coworker (Lee King) that he (Mayes was fired for). GC's answer to Mayes' Interrogatory, number 10 states that Mayes was fired for violating policy and not for the escape. As the discrimination, preferential treat claims of Mayes' case was reopened, the Magistrate Judge did not allow Mayes' to present the "preferential issues" of his coworker, which was in error of the Magistrate Judge based on standard set by the Supreme Court as he improperly "weighed the evidence" and gave credence.

"In light of the defendant's motion for summary judgement as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence Lytle v. Household Mfg., Inc., 494 U.S.

> 545, 554-555 (1990); Anderson vs Liberty Lobby, Inc., supra, at 254; Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, n.6 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Liberty lobby, supra, at 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe."

King was not ever going to be reprimanded and was not reprimanded for the other violations mentioned by Galveston County and noted by the Magistrate Judge. Mayes pointed out in his objection to summary judgment, that King "was not going to be reprimanded and was only reprimanded because Mayes informed Esmond of King's exact violation.[11] It is questionably an issue of why King was not immediately reprimanded or fired for his allegation of violating policy as in the case of Mayes

II. Mayes established a genuine issue of "Pretext" in reference to the reason given of why he was fired (policy violation).

> "A plaintiff's prima facie case of discrimination (as defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, and subsequent decisions), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination under the ADEA. In this case, Reeves established a prima facie case and made a substantial showing that respondent's legitimate, nondiscriminatory explanation, i.e., his shoddy record keeping, was false." Roger Reeves vs Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)

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[11] see vol.2 pg 513,vol.3 pg 248 and noted by the District Courts Order No. 66 pg359

In Mayes' case GC consistently stated that on August 22, 1995 Mayes blatantly violated a well known established policy of the county that led to the escape of two detainees. And that the policies had in fact been properly publicized to the employee of the Detention Center by way of copies being placed in employee's mailboxes, etc. Likewise, GC's answer to Mayes' interrogatory (#10) stated that Mayes was fired for a policy violation and not the escape. The Magistrate Judge in his granting of summary judgment resounded that Mayes willfully violated the policies of GC. Mayes presented ample evidence that the reason for his termination was a pretext (policy violation). See also, quote from the trial court's summary judgment order #66 page 12/16

III. Mayes has actionable rights for claims brought under USC Title 42 § 1981 and 1983. Government employees and in certain circumstances, some governmental entities may be liable for damages resulting from depriving individuals of their constitutional rights. {See 42U.S.C.§1983; **Monell v. New York City Dept. of Social Services**, 436 U.S. 658, 690-695, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) municipalities may be guilty of violating section 1983; **city of Arlington v. Byrd**, 713 S.W. 2d 224, 228 (Tex. App. - Fort Worth 1986, ref. N.r.e.), cert. Denied, 482 U.S. 929 (1987); **City of Houston v. Glenshannon Townhouse**, 607 S.W. 2d 930, 935 (Civ. App. - Houston {1st Dist.} 1980, no writ).

A. The actions of Mayes' supervisor's were malicious and intentional. Angry with the tardy issue, Mayes supervisor's intentionally faulted him. Mayes learned through the course of litigation that Superintendent Richard Gayden coerced JDO Fredrick Richardson to write a second statement claiming he asked Mayes not leave him in the portable building.

> Courts have used agency principles to hold employers responsible for outrageous conduct perpetrated by coworkers when there is evidence that the employer ratified the actions of its employees by permitting their outrageous conduct to lead to the

termination of a coworker. See; Long vs. Eastfield college, 88 F. 3d 300(5th Cir. 1996).

Mayes' supervisors told lies and fabricated stories to have him fired. No paper trail, only verbal statements of Mayes' "serious behavior problems." Again, Progressive Discipline was implemented, but not adhered to, nor was Mayes allowed to correct any noted discrepancies. Galveston County is liable for the torts committed by those in competent authority. An employer may be liable in tort for wrongful discharge if the discharge contravenes the clear mandate of public policy as expressed by the legislature of courts. See Thompson v. St. Regis Paper Co., 102 Wash., 2d 219, 685 P2d 1081, 105 CCH LC¶55616

Liability Governmental UnitsArt 6252-19 Vernon's Ann. Civ. St. sec3. Each unit of government in the state shall be liable for money damages for personal injuries are death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment..., "Officer, agent or employee" shall mean every person who is in the paid service of any unit of government by competent authority, weather full are part-time, whether elective or appointive, and whether supervisory or nonsupervisory, it being the intent of the Legislature then this Act should apply to every person in such service of a unit of government... Art 6252-19 Vernon's Ann. Civ. St. sec. 2 (3).

B. Mayes' claim of Galveston County's "Negligence" was misconstrued. GC made this statement in its Summary Judgment motion of December 1997 under section V.

> " Mayes does not complain about being injured by errant vehicles, a slip and fall on he premises or an injury caused by the misuse of tangible property; rather his claim is that the defendants were negligent in firing him."

This was resounded by the Magistrate Judge as well as the Appellate Court. No where in Mayes' complaint does he make such a statement. Mayes' negligence claims are clearly

stated in his complaint of October 23,1997 under Facts and Causes of Action, Letter D.
"The Defendant negligently failed to furnish Plaintiff with a safe place to work that would detain and deter detainees from easily escaping."

Letter E. "Upon Plaintiff's transfer to the PB the Defendant negligently failed to instruct or inform Plaintiff of any PB policies or procedures. As a result, the Plaintiff's Constitutional Right of Due Process was violated."

Letter F. "The Defendant was negligent in the manner in which they handled the investigation of the incident of August 22, 1995 resulting in the Plaintiff's termination." "The Defendant was also negligent in training and failing to properly supervise the Plaintiff's supervisors."

C. The "Proximate Cause" of the Escapes was because of the "Negligence" of Galveston County in making known needed repairs, as stated in Mayes' complaint.

"Prior Knowledge" "Premises Defect"

GC owed a duty of care to its employees and breached that duty. Esmond was well aware of the inadequate facilities and admitted that there were multiple escapes prior to the incident involving Mayes.[12]He did nothing on behalf of the employees but would hold an employee responsible for an escape. As this was the case (an employee being fired for an escape) GC should have made the facilities more reasonably safe for its employees if termination was going to be an option that GC would utilize against an employee.[13] See City of Fort Worth v Adams (App. 2 Dist. 1994) 888 SW 2d 607, rehearing overruled. Error denied, rehearing of writ of error

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[12] See Plaintiff's Motion for Court to Amend Final Judgment, Exhibit "I" Defendant's response to Plaintiff's request for admission, Vol. 2 pg. 403 admission #13. Also see escape incident of 1993 of detainee climbing fence found in Plaintiff's Motion to Compel for documents Vol. 3 pages 219-218.
[13] See Plaintiff's Exhibit "#20-A" and video tape Exhibit "5" of poor fencing.

overruled, certiorari denied 116 S.Ct. 525,133 L.Ed.2d 432. Actual Knowledge" of defects in real property, which give rise to city's duty to warn under Texas Tort Claims Act, embraces those things such which reasonably diligent inquiry and means of information at hand would have disclosed. City of San Benito Vs. Cantu (App.13 Dist 1992) 831 S.W.2d 416. Unlocked and open status of self locking inner door at county mental health facility was condition of property, waving governmental immunity in action to recover for personal injury or death allegedly caused by condition or use of tangible personal or real property in negligent action; door was defectively incomplete for its intended purpose.

The supervisors of the Center had knowledge of the faulty door and knew the barbed fencing was inadequately detaining the juveniles as there were multiple escapes by way of the fencing. Bossley v. Dallas County Mental Health and Mental Retardation (App. 5 Dist. 1995) 934 SW 2d 689; Mental anguish is "personal injury" within meaning of Texas Tort Claims Act, for which Plaintiff may recover an action against governmental unit under exception to act where injury is caused by of tangible personal or real property in manner that the governmental unit would be liable if it were private person. Likes v. City of Tyler (App. 12 Dist. 1995) 910 SW 2d 525, rehearing overruled, error granted.

Mayes noted in his complaint of the mental anguish and emotional distress damages suffered, as a result of GC's supervisor's deliberate and malicious acts as a result of also failing to provide the employees with a safe place to work.

IV. Governmental immunity is no defense to Federal and or Constitutional Rights violations. Municipality acting under color of law may be subjected to liability for damages resulting from deprivation of constitutional rights of another. 42 U.S.C. § 1983; Monell v New York City Dept. of Social Services, 436 U.S. 658,690-695,98 S. Ct.2018, 56 L.Ed.2d 611(1978).

V. Fed. Rule of Civ. Procedure "Relation Back of Amendments," Rule15 (c) - In reference to the Appellate Court "defining " a proper First Amendment Retaliation

complaint and Fair Labor Standards Act violation, Mayes' complaint is actionable. The First Amendment of the Constitution of the United States gives every citizen the right to freedom of speech. A person may sue for an award of money damages against anyone who, "under color" of any State law or custom, intentionally violates the plaintiff's rights under the Constitution of the United States. Thus, the plaintiff must prove by a preponderance of the evidence each of the following:

1. That the actions of the defendant(s) were "under color" of the authority of the State of Texas;

2. That the plaintiff's speech activities were Constitutionally "protected" under the First Amendment;

3. That the plaintiff's exercise of protected First Amendment rights was a substantial or motivating factor in the defendant(s) decision to discharge the plaintiff from employment;

4. That the defendant(s) acts were the proximate or legal cause of the plaintiff's damages. State or local officials act "under color" of the authority of the State when they act within the limits of their lawful authority. However, they also act "under color" of the authority of the State when they act without lawful authority or beyond the bounds of their lawful authority if their acts are done while the officials are purporting or pretending to act in the performance of their official duties. An official acts "under color" of the state authority if he abuses or misuses a power that he possesses only because he is an official.

A. Galveston County had a "permanent, wide spread, policy manual that contained Progressive Discipline," which it did not utilized in the decision to fire Mayes. Fourteenth Amendment, "Procedural Due Process," depriving Mayes of his Constitutional Rights. If a termination violates the progressive discipline procedure set forth in the employer's handbook, the employer has breached its promise of procedural fairness, and the

employee may recover for wrongful discharge. Shah vs General Electric Co (CA6 Ky) 816 F2d 264, 43 BNA FEP Cas 1018, 2 BNA IER Cas 104, 43 CCH EPD ¶ 37013, on remand (WD Ky) 697 F Supp 946, 3 BNA IER Cas 312. Esmond, considering the high rank that he held in his official capacity, established his own policies and procedures (The Youth Service Center Manual, YSCM) which too were not adhered to by procedure. As noted in the YSCM, page 6, chapter C under Discipline and Discharge, that states,

> "Employees will not be disciplined or discharged without just cause."

Also, employee's probation was only 6 months. Well past his 6 months probation, Mayes was not given a Grievance Hearing. See, Second Circuit- Where sheriff, as highest ranking law enforcement official in county, established a policy for strip-body cavity searches of all arrestees, county was liable for damages caused by such policy. Weber v. Dell, 804 F.2d 796, 803 (2d Cir.1986). Under §1983 a municipality may be liable for the unconstitutional act of its employees if plaintiff pleads and proves; (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right. Plaintiff must establish the causal link between the custom or policy and the denial of a constitutional right. Batista v. Rodriquez, 702 F. 2d 393 (2d Cir.1983).

1. Constitutional Procedural Due Process. Mayes had a property interest in his job based on Galveston County's policy manuals.

VI. Mayes should have been afforded an answer to the request for his trial transcripts before the ruling of his appeal. Constitutional Due Process. Procedural Due Process. Mayes had to exhaust every measure that was available to him in keeping his appeal alive. Mayes believed that an answer

would have been proper, before a ruling, as did the District Court.

VII. Fed. Rule of App. Procedure. Rule 10 4(c). Based on the evidence and the proceedings, from Mayes' Recollection, during his trial when Mayes moved to Present his coworkers exact violation he was denied by the Magistrate Judge (in error). Service of this statement (Recollection) was served on Galveston County Legal Department on August 28, 2002.

VIII. Mayes believed that he would receive a fair trial if he had to represent himself. The issues in Mayes' case were not that factually and/or legally complex to where common sense could resolve those issues on fairness. Although the Magistrate Judge made this statement, Mayes still sought counsel. As lawyer after lawyer turned down Mayes' case, Mayes put forth the best effort that he could in representing his interest and outside of working full time worked diligently as not to be the cause for delay. While Mayes' efforts were not made to discredit the sacrifice one has to make to enter the law field, he had no other choice as he believed the proceeding's in his case were not adequately and fairly treated.

## REASONS FOR GRANTING THE PETITION

A United States Court of Appeals and District Court has decided an important Federal Question in a way that conflicts with relevant decisions of this Court. In the case of Roger Reeves vs Sanderson Plumbing Products Inc. U.S. 147 L.Ed. 2d 105 (2000) this Court clearly set the standard for cases concerning Civil Rights discrimination suits. Your petitioner has too the best of his ability exhausted his means of seeking justice. And while justice has not been served in the administration by the lower courts, their (lower court's) appropriation was clearly defiant to that of his (Mayes') case. In all Fairness, Righteousness and Juistice, Mayes should receive a new trial to which all-valid claims and evidence will be allowed.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alfy L. Mayes

Alfy L. Mayes

Date: 17 December 2002

# APPENDIX "A"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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FILED: MAR 01 2002

NO. 01-40550

(Summary Calendar)

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Alfy Levine Mayes

Plaintiff – Appellant

Versus

Galveston County Juvenile Detention Center; ET AL

Defendants,

Galveston County Juvenile Probation Department; Galveston County

Defendants-Appellees

---

Appeal from the United States District Court
For the Southern District of Texas
G-96-CV-301

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Before JONES SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM

Alfy Levine Mayes appeals the final judgment against him in his civil rights suit against Galveston County. Mayes worked as a guard at the Galveston County Juvenile Detention Center. He was away from his post when two juveniles escaped from the facility, and the county terminated his employment. Mayes received a right to sue letter from the EEOC and commenced this suit in district court. Mayes's *pro se* complaint alleges a number of claims; racial discrimination in violation of Title VII, 42 U.S.C. § 1981, and 42 U.S.C. § 1983; retaliation for the exercise of his First Amendment rights in violation of § 1983; deprivation of due process' and state tort law claims.

The parties consented to trial before a magistrate judge. The judge initially granted summary judgment on all claims to the defendants (hereinafter "Galveston County"). After the judge's initial order granting summary judgment, the United States Supreme Court announced its decision in *Reeves v. Sanderson Plumbing Products, Inc., 530* U.S. 133 (2000), which clarified the standard for summary judgment in Title VII cases. In light of *Reeves* and additional evidence submitted by Mayes after the summary judgment order, the magistrate judge reversed in part his earlier decision and permitted Mayes to take the racial discrimination claims only to the jury. After a trial, the jury found that race was not a substantial motivating factor in Galveston County's decision to terminate Mayes. Mayes now appeals the jury's verdict and the summary judgment against him.

We interpret the briefs of pro se litigants liberally. *E.g., Grant v Cuellar,* 59 F .3d 523, 524 & n.3 (5th Cir. 1995). Much of Mayes's pro se brief is devoted to a factual exposition of the case. He appears to challenge the jury's factual conclusion that race was not a substantial factor in

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*Pursuant to 5th Cir. R. 47 .5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

Galvestn County's decision to fire him.

Any challenge to the jury's verdict as unsupported by the evidence is precluded by the fact that Mayes did not move for a judgment as a matter of law at the close of all the evidence. A FED. R. CIV.P. 50 motion is a prerequisite to challenging the sufficiency of the evdence on appeal. *Burns v. Texas City Refining, Inc.*, 890 F.2d 747, 749 n.1 (5th Cir. 1989) ("A motion construable as a directed verdict at the close of the evidence by the party seeking review is a prerequisite to presenting a claim of insufficient evidence to the appellate courts.").

Moreover, Mayes's failure to produce a transcript of the trial as required by FED. R. APP P. 10(b)(2) prevents us from upsetting the jury's verdict.[1] Rule 10(b)(2) provides that if the "appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion." Galveston County correctly points out that failure to provide a transcript on appeal can form the basis for the dismissal of the entire appeal. See FED. R. App. P. 3(a)(2) (stating that an appellant's failure to any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but may result in dismissal of the appeal or other action deemed by the Court of Appeals to be appropriate); *Richardson v. Henry*, 902 F.2d 414,416 (5th Cir. 1990) ("The failure of an appellant to provide a transcript is a proper ground for dismissal of the appeal."). Here, given the litigant's pro se status and financial difficulties in obtaining the transcript, we decline to exercise our

[1] We deny Mayes's motion for transcripts at the government's expense. Mayes has not been given leave to proceed in forma pauperis under 28 U.S.C. § 1915, and pauper status is a statutory prerequisite to obtaining transcripts at government expense. See 28 U.S.C. § 753(f) (allowing "persons permitted to appeal in forma pauperis" to obtain transcripts at government expense).

discretion to dismiss the entire appeal. *Coats v. Pierre*, 890 F.2d 728,731 (5th-

Cir. 1989) noting that the Court of Appeals has discretion in fashioning a response to the failure to include the transcript on appeal, and that dismissing the entire appeal is a drastic remedy to which we should rarely resort.) we nevertheless will not review any claims that depend on the sufficiency of the evidence adduced at trial. Without the trial transcripts, we have no basis for inquiring into whether the evidence supported jury's verdict. We also have no basis on which to evaluate Mayes's generalized claims that the trial judge made incorrect evidentiary rulings or inappropriate comments to the jury.

Mayes also contends that the trial court erred in instructing the jury only on the Title VII claim, but not on the §1981 and § 1983 racial discrimination clams. Assuming *arguendo* that the trial judge incorrectly instructed the jury, any such error is harmless. The jury found that Galveston County did not discriminate against Mayes on the basis of his race. This factual finding precludes relief under Sections 1981 and 1983 just as it precludes relief under Title VII.

Mayes also challenges the summary judgment entered against him on the claims other than racial discrimination. We review a grant of summary judgment *de novo*, applying the same standard as the district court. *E.g., United States v. Lawrence*, 276 R.3d 193, 195 (5th Cir. 2001). As such, Mayes's failure to provide a transcript of the trial evidence does not in any way hinder our ability to review the summary judgment order. We review the summary judgment order only on the basis of the summary judgment recorded, all of which is part of the record on appeal. The trial transcripts is simply not relevant to our review of this order, as the district court would not and could not have considered trial evidence at the time it rendered its summary judgment decision.

Mayes claims that the County violated his rights under the First Amendment by retaliating against him for speaking out about practices at the Juvenile Detention Center that violated the Fair



Labor Standards Act (FLSA). Mayes questioned the county's practice of requiring guards to attend staff meetings, without pay, on their days off. As a result of a Department of Labor investigation, Galveston County was found in violation of the FLSA and required to pay back wages. Mayes submitted an affidavit in which he said that, after he complained about the FLSA violations, he felt like he had a "big bull's eye" on his back. Moreover, one letter to Mayes from the facility's superintendent, Richard Gayden, accused Mayes of being "more concerned with challenging rules or procedures rather than conforming to them." Mayes argues that he presented sufficient evidence to create a genuine issue as to whether his complaints about FLSA violations lead to his discharge, in violation of the First Amendment.

Mayes's First Amendment claim fail because his complaints about the FLSA don not touch on a matter of Public concern. In *Connick v. Myers*, 461 U.S. 138, 147 (1983), the Supreme Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the First Amendment does not prohibit the public employer from firing the employee for speech.. An employee speaks on a matter of public concern when his speech addresses "any matter of political, social, or other concern to the community." Id. Here, Mayes was speaking as an employee, not as a citizen. His complaint was that he was not being paid for short, mandatory staff meetings. This complaint is of concern only to the employees of the detention center, not to the community in general. The complaint does not concern, for example, the conditions of confinement at the center or the danger of escape or any other matter in which the public at large might have some interest. Mayes avers that he was not just looking out for his own best interest, but also for the interests of all the employees. But Mayes was nevertheless speaking as an employee, about matters of interest only to employees, and not as a

Citizen on a political or social issue of interest to the community. As such, the district court correctly granted summary judgment to Galveston County on this claim.

We note that the FLSA itself provides a cause of actin when an employer retaliates against an employee for filing a FLSA grievance. 29 U.S.C. § 215 (a)(3); 29 U.S.C. § 216. But Mayes never sought relief under these sections. He filed a "clarification" with the trial court insisting that he did not rely on the FLSA for any of his claims. The trial court in its summary judgment motion and Mayes in his brief on appeal discuss retaliation only in terms of the First Amendment.

Mayes argues that he was deprive of "property...without due process of law" in violation of the Fourteenth Amendment because he was not given a hearing before being fired and because the policy he violated was not adequately publicized. As an at-will employee, Mayes had no property interest in his job. *Garcia v. Reeves County*, 32 F.3d 200, 203 (5th Cir. 1994) ("To prevail on a claim of deprivation of employment without due process of law, plaintiff must show that he had a cognizable property interest in his continued employment and that the process he wa afforded was insufficient to protect that interest."). Because Mayes never had a property interest in his job, the due process clause does not apply to the county's decision to fire him.

The trial court also correctly held that Maye's state law claims (principally that the county was "negligent" in firing him) are not cognizable under state law.

We therefore AFFIRM the judgment of the district court and DENY Mayes's motion for transcripts at government expense.

# APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

Alfy Mayes — FILED: APR 20, 2001

Vs. — #99

Civil No. G-96-301

Galveston County

**FINAL JUDGMENT**

On April 16, 2001, trial commenced in the above styled and numbered cause before a jury by consent of the parties pursuant to 28 U.S.C. § 636 ( c)(1). At the close of the evidence, the jury was instructed and heard closing arguments. After completing its deliberations the jury found that Plaointiff had failed to prove that his race is a substantial or motivating factor that prompted the Defendant to discharge him from employment. Accordingly, the Defendant is entitled to judgment.

It is, therefore, ORDERED and ADJUDGED that Plaintiff shall take nothing; that Plaintiff's sole remaining claims of race discrimination are DISMISSED with prejudice; and that the Defendant shall recover of the Plaintiff all costs incurred in this action.

THIS IS A FINAL JUDGMENT.

DONE at Galveston, Texas, this 20th day of April 2001.

"s/John R. Froschner
UNITED STATES MAGISTRATE JUDGE

# APPENDIX "C"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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FILED: APR 10 2002

NO. 01-40550

(Summary Calendar)

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Alfy Levine Mayes

Plaintiff - Appellant

Versus

Galveston County Juvenile Detention Center; ET AL

Defendants,

Galveston County Juvenile Probation Department; Galveston County

Defendants-Appellees

---

Appeal from the United States District Court FOR THE Southern District of Texas, Galveston

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Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.
PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file petition for rehearing en banc out of time is "s/granted."

ENTERED FOR THE COURT:

"S/Emilio M. Garza
United States Circuit Judge

# APPENDIX "D"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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FILED: JUN 3, 2002

NO. 01-40550

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Alfy Levine Mayes

Plaintiff—Appellant

Versus

Galveston County Juvenile Detention Center; ET AL

Defendants,

Galveston County Juvenile Probation Department; Galveston County

Defendants-Appellees

---

Appeal from the United States District Court FOR THE Southern District of Texas, Galveston

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ON PETITON FOR REHEARING

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petiton for rehearing is "s/denied."

ENTERED FOR THE COURT:

"S/Emilio M. Garza
United States Circuit Judge

# APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Alfy Mayes — Filed FEB 01, 2000

V — Civil Action No. G-96-301

Galveston County Juvenile
Probation Department, Et Al

## ORDER # 66

Before the court is defendant's Motion for Summary Judgment and Brief in Support filed on December, 31, 1997, t o which Plaintiff filed a response on January 30, 1998.

On November 9, 1999, Plaintiff filed instrument number 64, a Motion for Hearing, which is DENIED.

Having given the Motion for Summary Judgement, Plaintiff's Opposition thereto; and all of the evidence through consideration, it is the opinion of this court that Defendant's Motion for Summary Judgement should be GRANTED.

Factual Background

After receiving a right-to-sue letter on or about February 27, 1996, Plaintiff, proceeding *pro se*, filed the instant civil action on May 29,1996, alleging that he was discharged on Sept 8, 1995, due to bias against him on account of his race, African-American, in violation of Title VII of the Civil Rights Act of 1964. In his original complaint, Plaintiff alleged that he had been terminated based on his race, while a white employee who had

committed the same policy violation was not terminated. After originally naming Chief Juvenile Probation Officer Jerry Esmond[1] and the Galveston County Juvenile Detention Center as defendants, Plaintiff amended his complaint on November 20, 1996, to name the Galveston County Juvenile Probation Department as a defendant, and he was subsequently granted leave to amend his complaint on November 5, 1997, to add Galveston County as a defendant to this lawsuit. It also bears mentioning that Plaintiff was granted leave to amend on September 11,1997, to add 42 U.S.C. § 1981 and 1983 as potential bases for his claims.

Instrument number 40, filed by the Clerk on October 23,1997, along with Plaintiff's Motion for Leave to File a Fourth Amended petition, constitutes the live pleading in the instant case. In this pleading, Plaintiff raises the following claims for relief: that his dismissal was the result of disparate and unequal treatment due to his race; that Defendant was negligent in failing to inform Plaintiff of certain policies pertaining o the portable building, thus violating Plaintiff's right to due process; that Defendants were negligent in the training and supervision of Plaintiff's and in their manner of handling the investigation of the August 22, 1995 incident; that Plaintiff was impermissibly denied an appeal before the Grievance Panel; that Plaintiff was



retaliated against for raising the issue of the lack of compensation for compulsory attendance at monthly staff meetings and for filing a grievance with Esmond regarding the mishandling of a shift change admonition by his immediate supervisors; and that Plaintiff's immediate supervisors defamed or slandered him by fabricating stories about him that were communicated to Esmond. As this Court understands instrument number 59, Plaintiff's Clarification, filed on August 11, 1998, there is no Fair Labor Standards Act claim currently before the Court; Plaintiff only sought to show the carelessness of Defendant in its treatment of employees by pointing to the Fair Labor Standards Act violation, for which the employees received an award of back wages for the period from November 10, 1994, through August 23, 19955. See Exhibit D to Defendants' Motion for Summary Judgment (U.S. Department of Labor Receipt for payment of Back Wages).

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[1] Defendant Esmond was dismissed from this lawsuit on Fefruary 18, 1997.

In addition to various pecuniary forms of relief sought, Plaintiff also seeks reinstatement to his former position as a juvenile detention officer.

The relevant undisputed facts are that Plaintiff was terminated from his position with the Galveston County Juvenile Probation Department on August 30, 1995, after an incident that occurred on August 22, 1995, in which two juveniles left the residential portable building via the back door and escaped over the fence. At the time of the escape, Plaintiff, who was on duty in the portable building, had left his post and gone to the main building to return a juvenile's chart. Under the policies and



Procedures pertaining to the portable building, there were to be "two or three male Detention Officers to supervise these kids at all times." See Exhibit A to Defendants' Motion for Summary Judgment.

The Discrimination Claims

In order to survive a summary judgment motion in a case of this nature, a plaintiff must first adduce evidence that is sufficient to establish the putative existence of every element of the prima facie case. Davis v. Chevron U.S.A., Inc., 14 F. 3d 1082, 1084-5 (5th Cir. 1994). To establish a prima facie case of race discrimination in a work rules violation case, Plaintiff must show that he either did not violate the work rule or that he did violate the rule but that employees outside the protected class who committed similar work rule violations were not punished with such severity. Mayberry v. Vought Aircraft Co., 55 F .3d 1086, 1090 (5th Cir. 1995). In the instant case, making the prima facie case boils down to showing that a non-African American employee was preferen-



tially treated under circumstances nearly identical to those presented by the instant case. Id.

Once the plaintiff has established a prima facie case, a presumption of discrimination arises, and the defendant must come forward with legitimate, nondiscriminatory reasons for the actions taken in order to satisfy the employer's burden of production at the second stage of the analysis. Mayberry, 55 F.3d at 1091. This bing done, the burden then shifts to the plaintiff to prove that the

defendant's proffered reasons are just a pretext for discrimination. Id. At 1089-90; 1091. To succeed at this juncture and avoid summary judgment evidence that creates a fact issue as to whether the reasons given by the employer were what actually motivated the employer and creates a reasonable inference that race was a determinative factor in the termination. *Equal employment Opportunity Comm'n v. Texas Instruments Inc.*, 100 F. 3d 1173, 1180 (5ht Cir. 1996). Stated another way, he must persuade the Court that a discriminatory reason more than likely motivated the defendant and that the proffered reasons were false. *St. Mary's Honor Ctr. V. Hicks*, 509 U.S. 502, 510-11 (1989) ; *Texas Dep't of Community Affairs v. Burdine*, 450 U. S. 248, 252-55 (1981). The plantiff can accomplish this with either direct evidence of discriminatory intent or with circumstantial evidence showing that the reasons were pretextual. *LaPierre v. Benson Nisssan, Inc.*, 86 F.3d 444, 449 (5th Cir. 1996).

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Defendant submits that Plaintiff has not made the required showing because he knowingly violated the portable building policy that two officers be present at all times when he left the building at 7:55 a.m., and this legitimate, nondiscriminatory reason resulted in his discharge. Concluding that the departure from policy gave the juveniles the opportunity to escape, Superintendent Richard Gayden recommended that Plaintiff be terminated, and Jerry Esmond accepted this recommendation. Plaintiff was precluded from going before the Grievance Panel because he was still a probationary employee at the time he was fired. *See* Exhibits C and E to Defendants' Motion for Summary Judgment. Plaintiff was replaced in his capacity at the Detention Center by Eddie Caldwell, a black male, who, at the time the motion for summary judgment was file, was still working for the Galveston County Juvenile Probation Department.

Plaintiff's failure to adhere to the portable building policy, leaving only one worker inside to oversee the juvenile offenders, was the second such incident of this nature, the first having involved an individual named Lee King. In the motion, Defendants note that Lee King is a white male, but the assertion in the motion that King had completed his probationary period at the time he was disciplined appears to be incorrect, based upon Defendat's own summary judgment evidence. See letter from Jerry

Esmond to Lee King dated September 28, 1995, appended as part of Exhibit B to Defendants' Motion for Summary Judgement, stating that " [d]ue to the fact that you are still on your probationary period, you cannot

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utilize the grievance system." Since both Plaintiff and King were probationary employees at the time they violated the portable building policy, Defendants cannot attribute the difference in the discipline meted out to them to any difference in status, as the motion might be read to infer.

Because Plaintiff has consistently maintained that he was disciplined more severely than Lee King for the same policy violation due to his race, Defendants have attached ample summary judgment evidence to their motion with respect to the King incident. See Defendants' Exhibit B. the evidence shows that although Plaintiff and King were charged with the exact same violation of policy, instead of being fired, King was suspended for three days. King was also accused of, and investigated for, having used force upon the juvenile he removed from the portable building during the incident in question.

The facts are as follows, on August 4, 1995, King determined that it was necessary to remove a juvenile from the portable building when the juvenile became unruly after being requested to return a Bible to King. The evidence shows that in addition to leaving his co-worker, Robert King, alone in the portable building to supervise the juveniles, he did not follow the normal procedure for transfer of a juvenile to the main building. It also appears that he may have spent an unspecified amount of time in the control room instead of immediately returning to his post. In the opinion of Rickey Scott, the Intake Officer, King's departure from his post reflected "a lack of sound judgement (sic)." In the opinion of the

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Co-worker, Robert King, the juvenile was not out of control and the situation was not a major crisis. The Galveston County Sheriff's Department report notes that the juvenile in question did not

receive a disciplinary writ-up , which would have been standard procedure under the circumstances.

Despite the similarity to the Mayes' incident noted by Superintendaent Gayden in his letter to Esmond dated September 25, 1995, and the concern he expressed that if the situation were not viewed as an emergency, King would have to be treated the same as Mayes, in the end, King received much less severe discipline for his actions. The record reflects that Gayden came to the conclusion that the most important distinguishing factor was that no major incident, such as an escape, had occurred in conjunction with the Lee King violation. Even though the intake officer had stated that King showed a lack of judgment and King's co-worker failed to corroborate the emergency nature of the situation, Gayden found that there was "nothing indicating Mr. King was negligent in his duties." He recommended that King be docked five days' pay. As previously stated, King was ultimately suspended without pay for three days.

The Court agrees with Plaintiff that it is curious that King was disciplined in late September for an incident that had occurred on August 4, 1995. By contrast, Plaintiff was discharged from employment on August 30, 1995, for and incident that had occurred on August 22, 1995. It bears mentioning that the excessive use of force investigation of the King incident was concluded on or around



August 14, 1995, so the pendency of a long investigation cannot be pointed to as cause for delay in disciplining King. Plaingtiff suggests in his affidavit that the only reason King was disciplined at all was because he had made it known to Esmond on or around September 13, 1995, that he knew about the King incident and the fact that King had not even been reprimanded.

In assessing the incident involving Plaintiff, hs superiors placed emphasis on his negligence in leaving his work area. See Exhibit C, August 25, 1995 letter from Richard Gayden to Jerry Esmond: "We are saying that Mr. Mayes was negligent." Gayden also, was of the opinion that Plaintiff should receive summary discipline to address a "serious behavior problem that threatens or disrupts department operations". After meeting on August 23,

1995, the committee evaluating Plaintiff's case came to the conclusion that he should be terminated for the following reasons: he willfully disregarded a rule he was aware of for a reason that did not rise to the level of an emergency , he had previously left a co-worker alone in a classroom in another non-emergency situation, and he had been spoken to n other occasions about rule violations. The committee found termination to be appropriate given that this sanction had either been proposed or had actually been meted out in the cases of other workers who had not been where they were supposed to be when juveniles had escaped. See Exhibit C, August 25,1995 letter from Gayden to Esmond. Exhibit C also contains the statement of Intake Officer Scott, who claims that when he saw Plaintiff in the control room and not at his post, he told



Plaintiff that he should not be away from his area without adequate coverage. Another item in Exhibit C is that statement of Plaintiff's co-worker in the portable building, Frederick Richardson, who claims that he told Plaintiff two times on the morning of August 22, 1995, not to leave him in the portable building by himself.

In addition to the items that directly pertain to the circumstances surrounding Plaintiff's termination, Exhibit C also contains the written reprimand Plaintiff received on August 3, 1995, for having been late to work and a letter from Gayden regarding the reprimand, setting forth Gayden's opinion that Plaintiff was "more concerned with challenging rules or procedures rather than conforming to them."

As stated above, Plaintiff must establish that Lee King was treated differently under circumstances "nearly identical" to his. *Mayberry*,55 F.3d at 1086. While the Court concurs with Plaintiff that the disparate disciplinary results are somewhat suspicious and while this Court would not necessarily have arrived at the same disciplinary measures for the two incidents, the record does reflect the undisputed fact what could not even remotely be deemed an emergency: the return of a juvenile's chart. While it may have been debatable whether King was actually dealing with an out-of-control juvenile , the authorities ultimately decided this fact in his favor. Therefore, the disparity

of punishment would appear to have resulted from a difference in conduct and circumstance, rather

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than racial animus. *Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir. 1980), cert. Denied, 449 U.S. 879 (1980) (judgment for employer affirmed in case where white and black employee engaged in fighting, black employee, found to be the aggressor, punished more severely). Whatever the merits of the employment decisions at issue, it must not be forgotten that Title VII does not require that an employer terminate its employees only for good cause; rather, it imposes a focus on the motives behind the employment decision, not on its merits. *Wilson v. Belmont Homes, Inc.*, 970 F .2d 53,57 (5th Cir. 1992). In other word, the inquiry is not whether the defendant made an erroneous decision but whether the decision to terminate the plaintiff was made with a discriminatory motive. *Mayberry*, 55 F .3d 1091.

Even if Defendants' answer to interrogatory number 10 states that Plaintiff was fired for a policy violation and not for the escape ( see Plaintiff's Exhibit A ), the fact remains that the reason for his more severe punishment was the escape of the two juveniles. This is the single most important fact distinguishing Plaintiff's situation from King's, and Gayden seized on this factual difference in his letter to Esmond dated September 27, 1995. See Defendants' Exhibit B. Thus, the circumstances were not nearly identical, as the test requires. See *Nieto v. L&H Packing Co.*, 108 F .3d 621, 623 (5th Cir. 1997) (minority plaintiff fired and white quality control supervisor warned over same incident, but otherwise contrasting circumstances delineated by the court); *Mayberry*, 55 F .3d at 1090. It appears, then, with respect to the

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Matter of discriminatory discipline, Plaintiff has failed to raise a genuine issue of material fact.

Plaintiff's main line of attack in his affidavit and other summary judgment evidence is that he and other employees had not received notice of the portable building policy over which he was terminated. He accurately points out that Defendants have

provided inconsistent answers in regard to when and how the policies were publicized to the employees. See Defendants' Answers to Interrogatories Numbers 1 and 25, Plaintiff's Exhibit A, and Defendants' Response to Plaintiff's Request for Production Number 8, Plaintiff's Exhibit B. Defendants' answers vary as to the exact date of completion of the policies, either March of May 1995, and their manner of publication, copy of policy either placed in employee's mail box or copies found in multiple places in the facility. Plaintiff has tendered the affidavits of five employees of the Probation Department who aver that at no time prior to Mayes' discharge were specific portable building policies placed in employees' mail boxes, hand-delivered, verbally recited, or seen posted in the detention facility.

Once again, however, these facts do not establish racial animus,, given that Lee King, a White employee, was also disciplined for violating the apparently underpublished policy. Thus, both an African American and a white employee may have been unfairly surprised by the underpublished policy. This is not however, evidence of discrimination.

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Finally, although it is not "outcome determinative" that Plaintiff was replaced by someone within the protected class, see *Nieto,* 108 F.3d at 624, it must not be forgotten that Plaintiff was replaced by an African American, Eddie Caldwell. Also relevant to the lack of discriminatory motive is the evidence that from August of 1992 through August of 1995, 31 out of the 60 employees of the Galveston County Juvenile Probation Department were black. See Plaintiff's Exhibit F. As the Nieto Court noted, the racial mix of a work force is relevant to the determination of whether an employment action was racially motivated. Id. At 624 n.6.

For all of the above reasons, it is the considered opinion of this Court that Defendant is entitled to summary judgment on Plaintiff's race discrimination claims, and it is so ORDERED.

The Retaliation Claim

As Plaintiff states in the live pleading, "[r] ace was not the primary factor intended by the Defendant," and as he stated in his affidavit, "I had no idea that my noninsubordinative inquiry about

an action of the department would have such an adverse affect on my employment. I conclude that after my inquiry of staff meetings, I had a big bull's eye on my back...." What Plaintiff is referring to, of course, is his inquiry regarding not being paid for attending mandatory staff meetings, a violation of the Fair Labor Standards Act. Plaintiff is clearly complaining about retaliation.

In order to establish a First Amendment retaliation claim, the plaintiff meet the following four-element test: 1. He must suffer an adverse employment decision; 2. His speech must relate to a



Matter of public concern; 3. His interest in commenting on matters of public concern must outweigh the defendant's interest in promoting efficiency; and 4. His speech must have motivated the defendant's action. *Teague v. City of Flower Mound, Texas,* 179 F .3d 377, 380 (5th Cir. 1999) (citing cases). Whether an employee's speech addresses a matter of public concern must be measured by the content, form, and context of the given statement, viewed in terms of the whole court record. *Connick v. Myers,* 461 U.S. 138, 147 (1983). As a general rule, when an employee is speaking not as a citizen upon matters of public concern, but instead as an employee only upon matters of personal interest, a federal court is usually not the appropriate forum in which to review the personnel decision taken by a public agency allegedly in reaction to the employee's speech. Id.

In the instant case, Plaintiff alleges that retaliatory action was taken against him because he questioned why he was not being compensated for attending monthly staff meetings that took place his day off from work and because he complained to Esmond about the handling of a " shift change admonition" by his super visors around the time that he was terminated.

Clearly, Plaintiff's speech in both instances related to matters of purely personal concern, and Plaintiff was speaking as an employee, and not as a citizen, when he engaged in the speech at issue. Therefore, he fails to meet the second element of the First Amendment retaliation test.

Accordingly, this Court, sua sponte, ORDERS that summary judgment be GRANTED as to any retaliation claims.

The Due Process Claims

Citing *Moulton v. City of Beaumont*, 991 F .2d 227, 230 ( 5th Cir. 1993) , Defendants contend that Plaintiff's somewhat farfetched claim that he was denied due process when he was not notified of the portable building policy must fail because he did not have a property interest in his employment with Galveston County. Based on section 2 of the County of Galveston Benefits, Policies and Procedures Manual, Plaintiff clearly had no property interest in continued employment as he was an at-will employee who could be terminated for "good cause, no cause, or bad cause." See Defendants' Exhibit E. Therefore, this Court is of the opinion that the Motion for Summary Judgment should be GRANTED as to this claim.

The Negligence Claims

Defendants note that the essence of Plaintiff's negligence claims is that Defendants were negligent in firing him. Because this Court agrees the Plaintiff's negligence claims do not fall within any of thew categories of waiver of sovereign immunity specified in the Texas Tort Claims Act, the negligence claim is barred by sovereign immunity. Accordingly, Defendants' Motion is GRANTED as to the negligence claims.

Libel and Slander Claims

Plaintiff maintains that his supervisors and co-workers fabricated stories about him that were communicated to Jerry Esmond. This Court agrees with Defendants that such intentional



Torts are barred by sovereign immunity, and if they were not barred by immunity, such claims would be barred by the one-year limitations period that pertains to such claims. Accordingly, the Motion for Summary Judgment is GRANTED as to all libel and slander claims.

For all of the reasons stated above, it is ORDERED that Defendant's motion for summary judgment is GRANTED and this action is DISMISSED in its entirety; each party shall bear its own costs.

DONE at Galveston, Texas, this 2d day of February, 2000.

"S/ ".

JOHN R. FROESCHNER
UNITED STATES MAGISTRATE JUDGE

# APPENDIX "F"

Alfy Mayes

Vs

Galveston County et al

Mr. Barry Wiley,

This letter is being served as notice as to the court proceedings that took place, during our trial in April of 2001. In reference to The Rules of Appellate Procedure, Rule 10 4(c) in mention to our recollection, when I moved to present Lee Kings exact violation of which I was terminated for, Magistate Judge John R Froeschner denied the admittance of that physical evidence that I wanted to present.
This letter is being submitted in accordance to the above rule as a statement being served on the Appellee in reference to those proceedings.

Thanks,

_____

Alfy Mayes

**Certificate of Service**

I hereby certified that Fed.R.Civ.P. Rule 5 has been complied with by serving a copy of the foregoing of each party herein by depositing same, by hand delivery on this date August 28, 2002. A copy has been served on the following persons:

Galveston County Legal Department
4127 Shearn Moody Plaza
Galveston, Texas 77550

_____

**Alfy Mayes**

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

Alfy Mayes FILED: SEP 24, 2002

Vs. #109

Civil No. G-96-301

Galveston County

**OPINION AND ORDER**

Alfy Levine Mayes, Plaintiff/Appellant in the above sstyled and numbered cause, filed his Notice of Appeal from an adverse judgment in this cause on May 21, 2001; the Judgment of this Court was affirmed on March 1, 2002, and Mayes' Motion for Rehearing was denied on June 3, 2002. On September 11, 2002, Mayes filed a document entitled "Certificate of Conference" which this Court will construe as a " Statement of the Evidence" submitted pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure. The Court assumes that Mayes intends to somehow seek further appellate review of this cause.

Under Rule 10(c) an "appellant may prepare a statement of the evidence or porceedings from the best available means, including his own recollection," but only if the transcript of the tial is unavailable. However, an appellant's inability or refusal to bear the financial burden of providing a transcript does not make the transcript unavailable within the meaning of the Rule. Richardson v. Henry, 902 F .2d 414, 416 (5th Cir. 1990) In the instant case Mayes' motin for a transcript at the

government's expense was denied on June 25, 2001, and he thereafter elected not to pay for it himself. Since the transcript is not "unavailable" Mayes' statement of the evidence (Instrument no. 107) must be, and it is herby, DISAPPROVED.

DONE at Galveston, Texas, this 23d day of September, 2002

"s/John R. Froeschner"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ALFY MAYES
Plaintiff

CIVIL ACTION NO. G-96-301

vs.

GALVESTON COUNTY JUVENILE
PROBATION DEPARTMENT,
GALVESTON COUNTY

## RESPONSE TO COURT'S OPINION AND ORDER

The District Court denied Plaintiff/Appellant Alfy Mayes' requests for his transcripts on June 25, 2001. Mayes made the same request to the Appellate Court, filed on or about August 13, 2001. Mayes did not receive a timely answer to his request before the Appellate Court ruled on his appeal in March of 2002 denying both Mayes' appeal and transcript request. As no answer was afforded, concerning his request for his transcript prior to the ruling, Mayes believing this to be improper has moved for review of the Appellate Court's proceedings concerning his transcript request. This Court and the Defendant stating that Mayes "elected not to pay" is incorrect.

Also on appeal to the Supreme Court in reference to the evidence presented during his trial, Mayes has moved to show that this Court improperly gave credence and weighed the evidence concerning Mayes vs Lee King's policy violation, Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-555. Relevant to Rule 10(c) of the Federal Rule of Appellate Procedure, "recollection," Mayes, the defendant attorney and this Court know (recollect) that as Mayes moved to present the preferential, disparate treatment of Lee King, this Court

denied him. Outside of the transcripts and all other issues that Mayes stated happened during his pro se trial, at the close of his trial, Mayes had the exact policy violation of Lee King marked as an exhibit that was not allowed.
This Court may disagree with Mayes, on how he intends to bring about the statement of evidence concerning King, stating that "The Court assumes that Mayes intends to somehow seek further appellate review of this cause." However, by this Court not allowing Mayes to present Kings violation during his trial, was, "in error" and Mayes has moved to present this as an issue that has merit, because the evidence concerning King should have been allowed during his trial in April of 2001. And with or without the transcripts Mayes is sure the proceedings occurred (how stated above) and thus a statement of the proceedings were made and submitted to those (appellee and Court) necessary to this motion per Fed. R. civ. P. Rule 10 (c). So presentation of the evidence concerning King may be very important in this Title VII cause of action and could have rendered a different verdict had it been allowed? Again, while the transcripts are not totally unavailable, this may become an important issue (the presentation of King's violation) to the proceedings. Was Mayes allowed to present the exact policy violation (of which Mayes was fired) of his co-worker, Lee King?

Thank you,

"S/ "

Alfy L. Mayes

cc United States Supreme Court

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was hand delivered September 30, 2002 to the following:

Mr. Barry C. Willey
Galveston County Legal Department
4127 Shearn Moody Plaza
Galveston, Texas 77550

"s/ "
Alfy L. Mayes
36-16th Ave. No
(409) 943- 4752
Texas City, TX. 77590